Senator Chuck Grassley, Ranking Member
Questions for the Record
Jennifer H. Rearden
Judicial Nominee to the United States District Court for the Southern District of New York

1. **In the context of federal case law, what is the academic or scholarly definition of super precedent? Which cases, if any, count as super precedent?**

   Response: In an essay for the University of North Carolina School of Law Carolina Law Scholarship Repository, Michael J. Gerhardt wrote: "Super precedents are those constitutional decisions in which public institutions have heavily invested, repeatedly relied, and consistently supported over a significant period of time"—"decisions whose correctness is no longer a viable issue for courts to decide . . . . " I am not aware of any authorities deeming any particular cases "super precedents." If confirmed, I will faithfully follow all Supreme Court and Second Circuit precedent.

2. **You can answer the following questions yes or no:**

   a. **Was *Brown v. Board of Education* correctly decided?**

   b. **Was *Loving v. Virginia* correctly decided?**

   c. **Was *Griswold v. Connecticut* correctly decided?**

   d. **Was *Roe v. Wade* correctly decided?**

   e. **Was *Planned Parenthood v. Casey* correctly decided?**

   f. **Was *Gonzales v. Carhart* correctly decided?**

   g. **Was *District of Columbia v. Heller* correctly decided?**

   h. **Was *McDonald v. City of Chicago* correctly decided?**

   i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**

   j. **Was *Sturgeon v. Frost* correctly decided?**

   k. **Was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* correctly decided?**

      Response to all subparts: As a district judge, I would faithfully apply all Supreme Court precedent. As a judicial nominee, I am constrained from commenting on any matter that could come before me. Code of Conduct for U.S. Judges (Jud. Conf. 2019). However, because *Brown v. Board of Education* and *Loving v.*

Virginia are established precedents that are unlikely to be the subject of future challenge, I will follow the approach of prior nominees and state my view, which is that those cases were correctly decided.

3. **Do you agree with Judge Ketanji Brown Jackson when she said in 2013 that she did not believe in a "living constitution"?**

   Response: I am not familiar with Judge Jackson's statement or the context in which it was made. If confirmed, I will faithfully follow all Supreme Court and Second Circuit precedent regarding the interpretation of Constitutional provisions.

4. **Should judicial decisions take into consideration principles of social "equity"?**

   Response: I am not familiar with the term "social equity." Black's Law Dictionary defines "equity" as "fairness; impartiality; evenhanded dealing" and "[t]he body of principles constituting what is fair and right." Black's Law Dictionary (11th ed. 2019). Judges should decide all matters before them by faithfully and impartially applying Supreme Court and Circuit Court precedent.

5. **Please explain whether you agree or disagree with the following statement: "The judgments about the Constitution are value judgments. Judges exercise their own independent value judgments. You reach the answer that essentially your values tell you to reach."**

   Response: I disagree with the statement. A judge's independent value judgments should play no role in interpreting and applying the law. If confirmed, I will apply Supreme Court and Second Circuit precedent to the matters before me.

6. **Is climate change real?**

   Response: This question is in the province of legislators. If I am confirmed and a question relating to climate change comes before me, I will apply any relevant Supreme Court and Second Circuit precedent. To the extent this question is targeting the possible role of expert testimony in a matter regarding climate change, the district court in such a case would play a "gate-keeping" function—not only to prevent the admission of unreliable evidence but also to ensure that the proposed testimony would aid the trier of fact in understanding the evidence or determining a fact at issue. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *see also* Federal Rule of Evidence 702.

7. **Do parents have a constitutional right to direct the education of their children?**

   Response: Yes. In *Meyer v. Nebraska,* the Supreme Court held that parents' right to direct the education of their children falls "within the liberty of the [Fourteenth] amendment." 262 U.S. 390, 400 (1923); *see Washington v. Glucksberg,* 521 U.S. 702,

720 (1997) (recognizing that "the 'liberty' specially protected by the Due Process Clause includes the right . . . to direct the education and upbringing of one's children") (citing *Meyer*).

8. **Is whether a specific substance causes cancer in humans a scientific question?**

Response: To the extent this question is targeting the possible role of expert testimony, the district court in a case concerning this issue would play a "gate-keeping" function—not only to prevent the admission of unreliable evidence but also to ensure that the proposed testimony would aid the trier of fact in understanding the evidence or determining a fact at issue. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *see also* Federal Rule of Evidence 702.

9. **Is when a "fetus is viable" a scientific question?**

Response: In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 860 (1992), the Supreme Court seemed to have viewed viability as a scientific question in stating that "*advances in neonatal care* have advanced viability to a point somewhat earlier" than when the Court decided *Roe v. Wade*, 410 U.S. 113 (1973) (emphasis added). Please also see my responses to Questions 7 and 8.

10. **Is when a human life begins a scientific question?**

Response: Some view this as a scientific question. Others see it as having moral, religious, political, or philosophical dimensions. If confirmed, I will faithfully and impartially apply any relevant Supreme Court and Second Circuit precedent should this question arise in any matter before me.

11. **Can someone change his or her biological sex?**

Response: To the extent this question is targeting the possible role of expert testimony, please see my responses to Questions 7 and 8.

12. **Is threatening Supreme Court justices right or wrong?**

Response: Black's Law Dictionary defines a "threat" as "a declaration of one's purpose or intention to work injury to the person, property, or rights of another." Black's Law Dictionary (11th ed. 2019). Based on that definition, any threat against a Supreme Court justice is wrong.

13. **Does the president have the power to remove senior officials at his pleasure?**

Response: The President's authority to remove appointed officials is generally exclusive; Congressional approval is not required. *Myers v. United States*, 272 U.S. 52 (1926). The President may only remove officials from independent federal agencies for cause,

however. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (holding that the President could not remove a Federal Trade Commissioner except for "inefficiency, neglect of duty, or malfeasance in office"). If confirmed, I will faithfully apply Supreme Court and Second Circuit precedent to any matter raising the President's removal power.

14. **Do you believe that we should defund or decrease funding for police departments and law enforcement, including the law enforcement entities responsible for protecting the federal courthouses in Portland from violent rioters? Please explain.**

Response: This question is within the province of legislators. If confirmed, I will faithfully and impartially apply Supreme Court and Second Circuit precedent. I will not have any role in making policy.

15. **Do you believe that local governments should reallocate funds away from police departments to other support services? Please explain.**

Response: Please see my response to Question 14.

16. **What is more important during the COVID-19 pandemic: ensuring the safety of the community by keeping violent, gun re-offenders incarcerated or releasing violent, gun re-offenders to the community?**

Response: This question is in the province of legislators. If confirmed, I will faithfully apply Supreme Court and Second Circuit precedent, as well as the sentencing factors in 18 U.S.C. §§ 3582(c)(1)(A) and 3553(a), to any case before me that raises issues relating to incarceration.

17. **What legal standard would you apply in evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?**

Response: If confirmed, I will faithfully apply the Supreme Court's precedent in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and the Second Circuit's precedent in *Kachalsky v. Cnty. of Westchester,* 701 F.3d 81 (2d Cir. 2012).

18. **Do state school-choice programs make private schools state actors for the purposes of the Americans with Disabilities Act?**

Response: I am not aware of a case that definitively answers this question.

19. **Does a law restrict abortion access if it requires doctors to provide medical care to children born alive following failed abortions?**

Response: I am not aware of a case that definitively answers this question.

20. **Under the Religious Freedom Restoration Act the federal government cannot "substantially burden a person's exercise of religion."**

    a. **Who decides whether a burden exists on the exercise of religion, the government or the religious adherent?**

    Response: In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court resolved the question of whether government action had substantially burdened the free exercise of religion.

    b. **How is a burden deemed to be "substantial[]" under current caselaw?**

    Response: In *Hobby Lobby*, the exercise of religion was substantially burdened where complying with the government's mandate would have forced the owners of closely held, for-profit businesses to violate their sincerely held beliefs, while not complying would have subjected them to a "very heavy" fine. *Id.*

21. **Judge Stephen Reinhardt once explained that, because the Supreme Court hears a limited number of cases each year, part of his judicial mantra was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

    Response: I am not familiar with this quotation or the context for Judge Reinhardt's statement. A district judge must faithfully and impartially apply precedent regardless of the likelihood of appellate review. If confirmed, I will faithfully and impartially apply Supreme Court and Second Circuit precedent.

22. **As a matter of legal ethics do you agree with the proposition that some civil clients don't deserve representation on account of their identity?**

    Response: I am not aware of any authority for the proposition that any civil clients do not deserve representation on account of their identity. Moreover, the American Bar Association's Model Rules of Professional Conduct provide that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." Rule 1.2(b).

23. **Do Blaine Amendments violate the Constitution?**

    Response: I understand Blaine Amendments to refer to a failed effort in the 19th century to block direct government aid to religious schools. In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the Supreme Court held, under the Free Exercise Clause, that a Montana scholarship program for students attending private schools could not prohibit families from using the scholarships at religious schools.

24. **Is the right to petition the government a constitutionally protected right?**

Response: Yes. The right to "petition the government for a redress of grievances" is protected by the First Amendment.

25. **What is the operative standard for determining whether a statement is not protected speech under the "fighting words" doctrine?**

Response: In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Supreme Court defined "fighting words" as words that, "by their very utterance, inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. Such words were seen as playing "no essential part of any exposition of ideas" and of only "slight social value." *Id.* The Court further developed the doctrine in several subsequent cases, including *Texas v. Johnson,* 491 U.S. 397, 406-10 (1989), in which "fighting words" were described as "a direct personal insult or an invitation to exchange fisticuffs."

26. **What is the operative standard for determining whether a statement is not protected speech under the true threats doctrine?**

Response: In *Virginia v. Black*, 538 U.S. 343, 359 (2003), the Supreme Court defined "true threats" to "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." The Court elaborated that "[t]he speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protect[s] the individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur." *Id.* (internal citation omitted).

27. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

    b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara**

Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

Response: No.

28. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

    b. **Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

    Response: No.

29. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.**

    Response: No.

    b. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.**

    Response: No.

c. **Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

30. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

    b. **Are you currently in contact with anyone associated with the Open Society Foundations?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with the Open Society Foundations?**

    Response: No.

31. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**
    a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

    b. **Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

Response: No.

32. **Please describe the selection process that led to your nomination to be a United States District Judge, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).**

Response: In May 2016, I expressed an interest in serving on the United States District Court for the Southern District of New York to Senator Kirsten Gillibrand. From that time through the present, I have had periodic contact with Senator Gillibrand and her staff. Later in 2016, I communicated with the Chairman of Senator Charles Schumer's Judicial Screening Panel. In January 2017, I submitted an application to the Panel. Between 2017 and 2019, I periodically supplemented my application, and I occasionally communicated with the Chairman of Senator Schumer's Panel and with Senator Schumer's office. On June 14, 2018, I interviewed with attorneys from the White House Counsel's Office and the Office of Legal Policy at the United States Department of Justice. Thereafter, I had periodic contact with attorneys at the White House Counsel's Office and the Office of Legal Policy. On February 12, 2020, President Donald Trump expressed his intent to nominate me for a position on the United States District Court for the Southern District of New York. On May 4, 2020, my nomination was submitted to the Senate. My nomination expired at the end of the 116th Congress in January 2021. On September 7, 2021, I interviewed with attorneys from the White House Counsel's Office. On September 24, 2021, the White House Counsel's Office informed me that the Office of Legal Policy would begin the vetting process. On January 19, 2022, my nomination was submitted to the Senate.

33. **During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

34. **During your selection process did you talk with any officials from or anyone directly associated with the American Constitution Society, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

35. **During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

36. **During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundations, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

37. **During your selection process did you talk with any officials from or anyone directly associated with Fix the Court, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

38. **List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding your nomination.**

Response: Please see my response to Question 32. In addition, following my nomination on January 19, 2022, I communicated regularly with the Office of Legal Policy regarding submitting my Senate Judiciary Questionnaire, completing my Financial Disclosure Report, preparing for my hearing before the Senate Judiciary Committee, and responding to my Questions for the Record. I was also in regular contact with the White House Counsel's Office regarding preparing for my hearing before the Senate Judiciary Committee.

39. **Please explain, with particularity, the process whereby you answered these questions.**

Response: I received the questions from the Office of Legal Policy on March 9, 2022. I reviewed each question, conducted research, and drafted responses. On March 10, 2022, I submitted draft responses to the Office of Legal Policy. The Office of Legal Policy provided input on my draft, which I considered. I finalized and submitted my responses on March 14, 2022.

Senate Committee on the Judiciary

Questions for the Record for Jennifer Hutchison Rearden, Nominee for the Southern District of New York

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions,they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previouslyprovided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-writtenand then articulate both the premise about which you disagree and the basis for thatdisagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide yourtentative answer as a consequence of its reasonable investigation. If even a tentativeanswer is impossible at this time, please state why such an answer is impossible andwhat efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, pleasestate the ambiguity you perceive in the question, and provide multiple answers whicharticulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

1. **How would you characterize your judicial philosophy? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.**

Response: If confirmed, I will uphold my oath to "faithfully and impartially discharge all the duties incumbent upon me . . . under the Constitution and laws of the United States." I will approach each case with an open mind, closely review the arguments, study the record in detail, apply Supreme Court and Second Circuit precedent, and stay within the confines of the questions presented to me. I will also "administer justice without respect to persons" and abide by the Code of Conduct for United States Judges. As the role of a Supreme Court Justice differs sharply from that of a district judge, I do not believe the judicial philosophies of the Courts identified above are comparable to my own.

2. **Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an 'originalist'?**

Response: Originalism refers to the method of construing a text according to its ordinary public meaning at the time it was drafted or adopted. If confirmed, I will faithfully apply Supreme Court and Second Circuit precedent concerning how to interpret any Constitutional provision or statute—including by consulting the provision's original public meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (employing originalism in interpreting the Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (employing originalism in interpreting the Confrontation Clause of the Sixth Amendment). I would not apply any label to my judicial philosophy.

3. **Please briefly describe the interpretive method often referred to as living constitutionalism. Would you characterize yourself as a 'living constitutionalist'?**

Response: I understand "living constitutionalism" to refer to interpreting the Constitution based on the belief that the Constitution evolves and changes over time, absent formal amendment. I do not view myself as a "living constitutionalist." I would not apply any label to my judicial philosophy.

4. **If you were to be presented with a constitutional issue of first impression— that is, an issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?**

Response: As a district judge, if faced with a Constitutional issue of first impression, I would follow Supreme Court and Second Circuit precedent prescribing the most applicable method of interpretation. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (employing originalism in construing the Second Amendment); *Crawford v.*

Washington, 541 U.S. 36 (2004) (employing originalism in interpreting the Confrontation Clause of the Sixth Amendment).

5. **Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?**

Response: If confirmed, I will follow Supreme Court and Second Circuit precedent in interpreting any Constitutional provision or statute. The Supreme Court has considered evolving community standards in assessing some Constitutional questions. *See, e.g., Miller v. California*, 413 U.S. 15, 24 (1973) (weighing contemporary community standards in analyzing free speech defense in obscenity prosecution). "[N]ormally," however, the Court "interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020); *see District of Columbia v. Heller*, 554 U.S. 570 (2008) (employing originalism in construing the Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (employing originalism in interpreting the Confrontation Clause of the Sixth Amendment).

6. **Do you believe the meaning of the Constitution changes over time absent changes through the Article V amendment process?**

Response: No. The Constitution may only be amended pursuant to Article V.

7. **Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be a religious organization like Little Sisters of the Poor or small businesses operated by observant owners?**

Response: Yes. The extent of such limits depends on the underlying facts and circumstances.

Actions by the federal government are governed by the Religious Freedom Restoration Act ("RFRA"), which states that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b); *see Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania,* 140 S. Ct. 2367 (2020) (applying RFRA to a religious organization); *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 719 (2014) (applying RFRA to small for-profit businesses owned by observant individuals); *see also* 42 U.S.C. § 2000cc(a)(1) (the Religious Land Use and Institutionalized Persons Act) ("RLUIPA") ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on . . . religious exercise . . . unless the government demonstrates" that it is "in furtherance of a compelling government interest; and is the least restrictive means of furthering" that interest.); *Mast v. Fillmore County*, 141 S. Ct. 2430, 2433 (Gorsuch, J., concurring)

("RLUIPA prohibits governments from infringing sincerely held religious beliefs and practices except as a last resort").

The framework for analyzing state government action under the Free Exercise Clause of the First Amendment is set forth in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993). Under *Hialeah*, if a law is either not neutral or is not generally applicable, then the law "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id*. at 531-32. In several more recent decisions, the Supreme Court has further developed that standard. *See, e.g.*, *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021) ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature"); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-97 (2021) ("Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied"); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) ("A law is not generally applicable if it invites government to consider particular reasons for a person's conduct by providing a mechanism for individualized exemptions" or "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way"); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018) ("[O]fficial expressions of hostility to religion in some of the [Colorado Civil Rights] commissioners' comments"—as opposed to "neutral and respectful consideration," *id.* at 1729—"were inconsistent with what the Free Exercise Clause requires.").

The Supreme Court has also identified a "ministerial exception" to claims under the Age Discrimination in Employment Act and Americans with Disabilities Act against a parochial school employer where the employee performed "vital religious duties." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020).

8. **Is it ever permissible for the government to discriminate against religious organizations or religious people?**

Response: No.

9. **In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman CatholicDiocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remainopen and subjected to different restrictions in those same zones. The religiousorganizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whetherthe religious entity-applicants were entitled to a preliminary injunction.**

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020), the Supreme Court preliminarily enjoined enforcement of a New York state executive

order restricting capacity at certain worship services. Based on statements "viewed as targeting" religion, and the fact that the challenged restrictions "single[d] out houses of worship for especially harsh treatment," the Court determined that the religious organizations had "made a strong showing that the challenged restrictions violate[d] 'the minimum requirement of neutrality' to religion." *Id.* at 66. Moreover, a "law is not generally applicable if it invites government to consider particular reasons for a person's conduct by providing a mechanism for individualized exemptions" or "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." Applying strict scrutiny, the Court also concluded that it was "hard to see how the challenged regulations [could] be regarded as 'narrowly tailored.'" *Id.* at 66-67. Finally, the "[t]he loss of First Amendment freedoms" had irreparably harmed the applicants. *Id*. at 66. And it was not "shown that granting the applications [would] harm the public." *Id*. at 68.

10. **Please explain the Supreme Court's holding and rationale in *Tandon v. Newsom*.**

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court preliminarily enjoined California's restrictions on at-home religious gatherings. The restrictions did not satisfy strict scrutiny because they were not neutral, generally applicable, or narrowly tailored. In permitting gatherings at "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants," the restrictions treated some "comparable secular activity more favorably than religious exercise," *id.* at 1296, even though those secular gatherings presented similar risks of spreading COVID-19. *Id.* at 1297. In situations "[w]here the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied." *Id.* at 1296-97.

11. **Do Americans have the right to their religious beliefs outside the walls of their houses of worship and homes?**

Response: Yes.

12. **Explain your understanding of the U.S. Supreme Court's holding in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.**

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission's cease-and-desist order against a bakery that refused to make a wedding cake for a same-sex couple did not comport with "the religious neutrality that the [Free Exercise Clause of the] Constitution requires." *Id.* at 1724. Specifically, the "neutral and respectful consideration to which [the plaintiff] was entitled was compromised . . . . The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." *Id.* at 1729.

13. **Under existing doctrine, are an individual's religious beliefs protected if they are contrary to the teaching of the faith tradition to which they belong?**

Response: An individual's sincere religious beliefs are protected regardless of "disagreement among sect members" or whether the beliefs "respond[] to the commands of a particular religious organization." *Frazee v. Ill. Dep't of Emp. Sec*., 489 U.S. 829, 833–34 (1989); *Ford v. McGinnis*, 352 F.3d 582, 589-90 (2d Cir. 2003) (stating that membership in a particular sect "or on any tenet of the sect involved" is not determinative and that "scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature.").

a. **Are there unlimited interpretations of religious and/or church doctrine that can be legally recognized by courts?**

Response: In *Frazee v. Illinois Department of Employment Security, et al.*, 489 U.S. 829, 833 (1989), the Supreme Court stated that "only beliefs rooted in religion"—not "[p]urely secular views"—are protected. Importantly, such beliefs need not be "acceptable, logical, consistent or comprehensible" in order to be protected. *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). In the Second Circuit, a court may only assess, based on a subjective test, the extent to which a religious belief is sincerely held. *Ford v. McGinnis,* 352 F.3d 582, 590 (2d Cir. 2003). It may not determine whether an individual's interpretation of religious doctrine is correct. *Id.*

b. **Can courts decide that anything could constitute an acceptable "view" or "interpretation" of religious and/or church doctrine?**

Response: Please see my response to Questions 13 and 13(a).

c. **Is it the official position of the Catholic Church that abortion is acceptable and morally righteous?**

Response: I am not aware of the official position of the Catholic Church.

14. **In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court reversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.**

Response: In *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court applied the "ministerial exception" to bar two lay Catholic school teachers' claims, under the Age Discrimination in Employment Act and Americans with Disabilities Act, respectively, against their parochial school employer. *Compare Our Lady of Guadalupe Sch.*, 140 S. Ct. 2049, *with Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,* 565 U.S. 171, 191 (2012) (applying the

ministerial exception to a teacher who was a minister). Under *Our Lady of Gaudalupe*, the touchstone of the analysis is "what an employee does," as opposed to his or her formal title. *Id*. at 2064. Specifically, an employee who performs "vital religious duties," including "[e]ducating and forming students in the Catholic faith," is subject to the ministerial exception. *Id.* at 2066.

15. **In *Fulton v. City of Philadelphia*, the U.S. Supreme Court was asked to decide whether Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless it agrees to certify same-sex couples as foster parents, violates the Free Exercise Clause of the First Amendment. Explain theCourt's holding in the case.**

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court considered the City of Philadelphia's refusal to refer foster children to Catholic Social Services. The City had declined to exempt Catholic Social Services from the non-discrimination provision in Philadelphia's standard foster care contract prohibiting a provider from rejecting foster parents based upon their sexual orientation. The Court concluded that the contract was not neutral and generally applicable due to "the inclusion of a formal system of entirely discretionary exceptions" that could be applied in favor of other foster services providers. *Id.* at 1878. The City offered "no compelling reason why it ha[d] a particular interest in denying an exception to CSS while making them available to others." Accordingly, Philadelphia's decision did not satisfy strict scrutiny and violated the First Amendment. *Id*. at 1882.

16. **Explain your understanding of Justice Gorsuch's concurrence in the Supreme Court's decision to grant certiorari and vacate the lower court's decision in *Mast v. Fillmore County*.**

Response: In *Mast v. Fillmore County,* 141 S. Ct. 2430 (2021), members of an Amish community in Minnesota claimed that complying with a county ordinance that required installation of a modernized septic system would infringe their sincerely held religious beliefs and therefore violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The Supreme Court vacated the judgment below and remanded to the Court of Appeals of Minnesota for consideration in light of *Fulton v. City of Philadelphia,* 141 S. Ct. 1868 (2021).

In his concurrence, Justice Gorsuch wrote that the county's determination and the state courts' application of RLUIPA were affected by several errors. First, instead of considering, as required by *Fulton*, whether the county had a compelling interest in denying the Amish community an exemption from the ordinance, "the County and courts below . . . treat[ed] the County's *general* interest in sanitation regulations as 'compelling' without reference to the *specific* application of those rules to *this* community." *Mast,* 141 S. Ct. at 2432 (Gorsuch, J., concurring) (emphasis in original). Second, the court "fail[ed] to give due weight to exemptions other groups enjoy," such as those who "'hand-carry' their gray water" and "are allowed to discharge it onto the land directly." *Id.* Third, the County and the lower courts "failed to give sufficient

weight to rules in other jurisdictions." *Id.* at 2433. Finally, the Minnesota County and the lower courts rejected the petitioners' proposed alternative, a mulch-basin method that is permitted by other states, "based on certain assumptions." *Id.* Strict scrutiny instead required the county to "prove with evidence that its rules [were] narrowly tailored to advance a compelling state interest with respect to the specific persons it [sought] to regulate," namely "that mulch basins will not work on these particular farms with these particular claimants." *Id.*

17. **Would it be appropriate for the court to provide its employees trainings which include the following:**

    a. **One race or sex is inherently superior to another race or sex;**

    b. **An individual, by virtue of his or her race or sex, is inherently racist, sexist,or oppressive;**

    c. **An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or**

    d. **Meritocracy or related values such as work ethic are racist or sexist?**

    Response to all subparts: No.

18. **Will you commit that your court, so far as you have a say, will not provide trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?**

Response: I will so commit, if I am confirmed and assume responsibility for the extent to which the court provides trainings to employees, and for the nature of those trainings. I am not aware if the judges of the Southern District of New York play any role in developing or administering trainings for employees.

19. **Is the criminal justice system systemically racist?**

Response: The extent to which the criminal justice system may be systemically racist is in the province of legislators. If confirmed, I will uphold my oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . ." 28 U.S.C. § 453. Moreover, if a case alleging racial discrimination comes before me, I will apply the relevant Supreme Court and Second Circuit precedent.

20. **Is it appropriate to consider skin color or sex when making a political appointment? Is it constitutional?**

Response: Under Article II, Section 2 of the Constitution, the President has the power to appoint, with the advice and consent of the Senate. If I am confirmed and this issue is raised before me, I will follow Supreme Court and Second Circuit precedent

interpreting Article II, Section 2. I will also apply any other relevant Supreme Court and Second Circuit authorities, including with respect to the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying equal protection requirements to the federal government).

21. **President Biden has created a commission to advise him on reforming the Supreme Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.**

Response: Considerations relating to the number of justices on the Supreme Court are within the province of policy makers. If confirmed, I will faithfully apply Supreme Court precedent regardless of the number of justices.

22. **Is the ability to own a firearm a personal civil right?**

Response: Yes. The Second Amendment furnishes "an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). In *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3023 (2010), the Supreme Court further held that "the Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the States."

23. **Does the right to own a firearm receive less protection than the other individual rights specifically enumerated in the Constitution?**

Response: The Supreme Court held that, "[l]ike most rights, the Second Amendment right is not unlimited." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2786 (2008). I am not aware of any Supreme Court or Second Circuit holding that the Second Amendment right receives less protection than the other individual rights specifically enumerated in the Constitution.

24. **Does the right to own a firearm receive less protection than the right to vote under the Constitution?**

Response: Please see my response to Question 23. To my knowledge, neither the Supreme Court nor the Second Circuit has held that the right to own a firearm receives less protection than the right to vote under the Constitution.

25. **Is it appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns? Please explain.**

Response: Pursuant to Article II of the Constitution, the President "shall take Care that the Laws be faithfully executed." Regarding criminal cases, the Supreme Court has recognized that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). If confirmed, I will follow all binding Supreme Court and Second Circuit precedent in evaluating any issues concerning the scope of executive power, *see, e.g., Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), including any

challenge to the executive's refusal to enforce a law.

26. **Explain your understanding of what distinguishes an act of mere 'prosecutorial discretion' from that of a substantive administrative rule change.**

Response: A substantive rule, issued by an agency "pursuant to statutory authority," "affect[s] individual rights and obligations," has the "force and effect of law," and requires notice and an opportunity to comment. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02, 313 (1979). The Supreme Court and lower courts continue to analyze what qualifies as substantive administrative rule changes. *See, e.g., PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.,* 139 S. Ct. 2051, 2055 (2019). Because this issue is currently pending in federal courts and could come before me if I am confirmed, I am constrained from commenting on whether particular acts, including an act of prosecutorial discretion, would amount to substantive administrative rulemaking. Code of Conduct for U.S. Judges (Jud. Conf. 2019). If confirmed, I will follow Supreme Court and Second Circuit precedent regarding these issues.

27. **Does the President have the authority to abolish the death penalty?**

Response: Congress has established the death penalty by statute. *See* 18 U.S.C. § 3591(a) (the Federal Death Penalty Act ("FDPA")). In so doing, Congress acted within its Article I powers. *United States v. Aquart*, 912 F.3d 1 (2d Cir. 2018). The President cannot unilaterally abolish duly enacted Congressional legislation. An act of Congress would be required.

28. **Explain the U.S. Supreme Court's holding on the application to vacate stay in *Alabama Association of Realtors v. HHS*.**

Response: In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court vacated a stay of a district court's judgment declaring unlawful a nationwide eviction moratorium mandated by the Centers for Disease Control and Prevention (the "CDC") during the COVID-19 pandemic. The Court determined that the CDC lacked the statutory authority to impose the moratorium.

Senator Josh Hawley
Questions for the Record

Jennifer Rearden
Nominee, U.S. District Court for the Southern District of New York

1. Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."

a. Do you agree with that philosophy?

Response: No. A judge's role is not to do what he or she "think[s] is right." If confirmed, I will uphold my oath to "faithfully and impartially discharge all the duties incumbent upon me" under the Constitution and laws of the United States.

b. If not, do you think it is a violation of the judicial oath to hold that philosophy?

Response: Please see my response to Question 1(a).

2. What is the standard for each kind of abstention in the court to which you have been nominated?

Response: Under the *Pullman* abstention doctrine, federal courts should abstain from adjudicating a case challenging state action under the federal Constitution when interpretation of an unclear state law would dispose of the issue. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498–501 (1941). The Second Circuit applies a three-part standard for addressing a *Pullman* abstention issue: "(1) an unclear state statute is at issue; (2) resolution of the federal constitutional issue depends on the interpretation of the state law; and (3) the law is susceptible 'to an interpretation by a state court that would avoid or modify the federal constitutional issue.'". *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004) (internal citation omitted). *Pullman* abstention is discretionary. *November Team, Inc. v. N.Y. State Joint Comm'n on Pub. Ethics*, 233 F. Supp. 3d 366 (S.D.N.Y. 2017).

The *Younger* abstention doctrine "forbid[s] federal courts [from] stay[ing] or enjoin[ing] pending state court" criminal proceedings. *Younger v. Harris,* 401 U.S. 37, 41 (1971). In the Second Circuit, *Younger* abstention is "mandatory when: (1) there is a pending state proceeding, (2) that implicates an important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 75 (2d Cir. 2003).

Pursuant to the *Burford* abstention doctrine, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies

when important or difficult questions of state law would affect state policy beyond the specific results in federal court. *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943). The Second Circuit considers the following factors when analyzing a *Burford* abstention issue: "(1) the degree of specificity of the state regulatory scheme; (2) the need to give one or another debatable construction to a state statute; and (3) whether the subject matter of the litigation is traditionally one of state concern." *Liberty Mut. Ins. Co. v. Hurlbut*, 585 F.3d 639, 650 (2d Cir. 2009).

Under the *Rooker-Feldman* abstention doctrine, federal courts have no authority to review "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005); *see also Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The Second Circuit has articulated a four-part test for determining whether *Rooker-Feldman* applies: "(1) the federal-court plaintiff must have lost in state court[;] (2) the plaintiff must complain of injuries caused by a state-court judgment[;] (3) the plaintiff must invite district court review and rejection of that judgment[;] and (4) the state-court judgment must have been rendered before the district court proceedings commenced." *Dorce v. City of New York*, 2 F.4th 82, 101 (2d Cir. 2021).

The *Colorado River* abstention doctrine raises the question of whether a federal court should exercise its jurisdiction when a concurrent state court action addresses similar claims. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). In the Second Circuit, courts consider whether (1) "the controversy involves a res over which one of the courts has assumed jurisdiction"; (2) "the federal forum is less inconvenient than the other for the parties"; (3) "staying or dismissing the federal action will avoid piecemeal litigation"; (4) "proceedings have advanced more in one forum than in the other"; (5) "federal law provides the rule of decision"; and (6) "the state procedures are adequate to protect the plaintiff's federal rights." *Woodford v. Cmty. Action Agency of Greene Cty.*, *Inc.*, 239 F.3d 517, 521–22 (2d Cir. 2001).

Pursuant to the *Brillhart/Wilton* abstention doctrine, a federal court may abstain where a plaintiff seeks "purely declaratory relief" while a parallel state court action is pending. *Kanciper v. Suffolk Cty. Soc. for the Prevention of Cruelty to Animals, Inc.*, 722 F.3d 88, 93 (2d Cir. 2013); *Wilton v. Seven Falls Co.,* 515 U.S. 277 (1995). The Second Circuit has identified five factors to consider when analyzing whether to abstain: whether "(1) the judgment will serve a useful purpose in clarifying or settling the legal issues involved"; "(2) a judgment would finalize the controversy and offer relief from uncertainty"; (3) "the proposed remedy is being used merely for procedural fencing or a race to res judicata," (4) "the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court," and (5) "there is a better or more effective remedy." *Niagara Mohawk Power Coy. v. Hudson River-Black River Regulating Dist.,* 673 F.3d 84, 105 (2d Cir. 2012) (internal quotation marks omitted).

Under the *Thibodaux* doctrine, "where a difficult question of state law of substantial import is presented," a federal court may abstain from "deciding questions of state law otherwise within [its] jurisdiction." *Smith v. Metro. Prop. Liab. Ins. Co.*, 629 F.2d 757, 759 (2d Cir. 1980) (citing *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27-29 (1959)).

3. Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?

Response: I do not recall working on any such case or representation.

a. If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.

Response. Not applicable.

4. What role should the original public meaning of the Constitution's text play in the courts' interpretation of its provisions?

Response: If confirmed, I will follow Supreme Court and Second Circuit precedent concerning how to interpret any Constitutional provision, including by consulting the provision's original public meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (employing originalism in interpreting the Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (employing originalism in interpreting the Confrontation Clause of the Sixth Amendment).

5. Do you consider legislative history when interpreting legal texts?

Response: If confirmed, I will faithfully apply Supreme Court and Second Circuit precedent in construing any statute. If I were not bound by Supreme Court or Second Circuit precedent, I would examine the text of the relevant provision and apply its ordinary meaning. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) (observing that the Supreme Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."); *Lozano v. Alvarez,* 697 F.3d 41, 56 (2d Cir. 2012), *aff'd,* 572 U.S. 1 (2014) ("Where a term is undefined in a statute, 'we normally construe it [in] accord with its ordinary or natural meaning.'"(internal citation omitted)). In the event of an ambiguity in the text, I would consider canons of statutory construction, such as *expressio unius est exclusio alterius*, *see, e.g., Green v. City of N.Y.,* 465 F.3d 65, 78 (2d Cir. 2006), and persuasive authority. As guided by the Supreme Court and the Second Circuit, I could turn to legislative history only if those sources failed to resolve the ambiguity. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 567 (2005) ("[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms"); *Green*, 465 F.3d at 78.

a. If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?

Response: The "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'" *Garcia v. United States,* 469 U.S. 70, 76 (1984) (internal citation omitted). Importantly, "floor statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB v. SW Gen., Inc.,* 137 S. Ct. 929, 943 (2017).

b. When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?

Response: It is never appropriate to consult the laws of foreign nations when interpreting the U.S. Constitution.

6. Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?

Response: Under Supreme Court precedent, "prisoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is *sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (citing to *Baze v. Rees*, 553 U.S. 35, 50 (2008)) (internal quotations omitted) (emphasis in original). The petitioner must show that "a 'substantial risk of serious harm'" is present—"an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Glossip*, 576 U.S. at 877 (internal citations omitted). The petitioner also must "identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* (citing to *Baze*, 553 U.S. at 52). In addition, the record must show that the state lacked a legitimate penological reason for refusing to adopt the alternative protocol. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019). I am not aware of a Second Circuit case applying this standard.

7. Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?

Response: Yes. As noted in response to Question 6, the petitioner must "identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a

substantial risk of severe pain.'" *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 52 (2008)).

8. Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?

Response: In *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 61-62 (2009), the Supreme Court considered whether the petitioner had "a right under the Due Process Clause to obtain postconviction access to the State's evidence for DNA testing." The Supreme Court "conclude[d], in the circumstances of th[e] case, that there is no such substantive due process right." *Id.* at 72. The Second Circuit later acknowledged the Supreme Court's statement in *Osborne* that "no freestanding substantive due process right to DNA evidence" exists and instead engaged in a state liberty interest analysis. *Newton v. City of New York*, 779 F.3d 140, 147-48 (2d Cir. 2015) (holding that New York law confers a liberty interest in demonstrating innocence with newly available DNA evidence).

9. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

Response: No.

10. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.

Response: The framework for analyzing state government action under the Free Exercise Clause of the First Amendment is set forth in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993). Under *Hialeah*, if a law is either not neutral or is not generally applicable, then the law "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id*. at 531-32. In several more recent decisions, the Supreme Court has further developed that standard. *See, e.g.*, *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021) ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature"); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-97 (2021) ("Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied"); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) ("A law is not generally applicable if it invites government to consider

particular reasons for a person's conduct by providing a mechanism for individualized exemptions" or "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way"); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018) ("[O]fficial expressions of hostility to religion in some of the [Colorado Civil Rights] commissioners' comments"—as opposed to "neutral and respectful consideration," *id.* at 1729—"were inconsistent with what the Free Exercise Clause requires.").

11. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: Please see my response to Question 10, which identifies binding authorities to evaluate whether state governmental action discriminates against a religious group or religious belief.

12. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

Response: An individual's sincere religious beliefs are protected regardless of "disagreement among sect members" or whether the beliefs "respond[] to the commands of a particular religious organization." *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833–34 (1989). In the Second Circuit, membership in a particular sect "or on any tenet of the sect involved" is not dispositive, and "scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Ford v. McGinnis*, 352 F.3d 582, 589-90 (2d Cir. 2003).

13. The Second Amendment provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

a. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008)?

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court held that the Second Amendment furnishes "an individual right to keep and bear arms." The Court further held that "the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635.

b. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No. (I am not currently a judge, nor have I previously served as a judge.)

14. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

Response: Given the context for this statement, it seems to support Justice Holmes's point that "a Constitution is not intended to embody a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

b. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?

Response: In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Supreme Court abrogated much of its decision in *Lochner*. Decades later, in *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), the Court explained that the "doctrine that prevailed in *Lochner* . . . ha[d] long since been discarded."

15. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

a. If so, what are they?

b. With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?

Response to all subparts: I am not aware of any Supreme Court opinions that have not been formally overruled by the Supreme Court but are no longer good law. If confirmed, I commit to faithfully and impartially applying all Supreme Court precedents as decided.

16. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

b. If not, please explain why you disagree with Judge Learned Hand.

c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.

Response to all subparts: If confirmed, I will faithfully apply Second Circuit precedent, including *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945), to any questions regarding whether a particular market share constitutes a monopoly. I will also apply relevant Supreme Court precedent. *See, e.g.*, *Eastman Kodak Co. v. Image Technical Servs., Inc*., 504 U.S. 451, 481 (1992) (holding that Kodak's control of "80% to 95% of the service market, with no readily available substitutes, is . . . sufficient to survive summary judgment under the more stringent monopoly standard of § 2" of the Sherman Act); *United States v. Grinnell Corp*., 384 U.S. 563, 571 (1966); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946).

17. Please describe your understanding of the "federal common law."

Response: Federal common law is derived from federal court decisions. *Black's Law Dictionary* (11th ed. 2019). There is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that federal courts sitting in diversity must apply substantive state law and federal procedural law). In "limited areas," however, such as "admiralty disputes and certain controversies between the States," "federal common law often plays an important role." *Id.*

18. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

Response: The highest court of a state determines the scope of that state's constitutional rights. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Federal courts must defer to the decisions of the highest court of a state whose constitution is being interpreted. *Id.* at 78; *accord Wainwright v. Goode,* 464 U.S. 78, 84 (1983) ("[T]he views of the state's highest court with respect to state law are binding on the federal courts.") If confirmed, I will look to the decisions of the highest court of the state whose constitution is before me.

a. Do you believe that identical texts should be interpreted identically?

Response: The U.S. Constitution must be interpreted according to Supreme Court and Circuit Court precedent. With respect to state constitutional provisions, "the views of the state's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode,* 464 U.S. 78, 84 (1983).

b. Do you believe that the federal provision provides a floor but that the state provision provides greater protections?

Response: The U.S. Constitution is "the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, c. 2. An important manifestation of our federalist system is that states, while bound by the U.S. Constitution, may confer greater protections than those provided in the U.S. Constitution.

19. Do you believe that *Brown v. Board of Education*, 347 U.S. 483 (1954) was correctly decided?

Response: As a district judge, I would faithfully apply all Supreme Court precedent. As a judicial nominee, I am constrained from commenting on any matter that could come before me. Code of Conduct for U.S. Judges (Jud. Conf. 2019). However, because *de jure* segregation is unlikely to be the subject of future litigation, I will follow the approach of prior nominees and state my view, which is that *Brown v. Board of Education* was correctly decided.

20. Do federal courts have the legal authority to issue nationwide injunctions?

a. If so, what is the source of that authority?

b. In what circumstances, if any, is it appropriate for courts to exercise this authority?

Response to all subparts: Federal Rule of Civil Procedure 65 governs the issuance of injunctive relief. Injunctions are a "drastic and extraordinary remedy." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). The Supreme Court has instructed that any such relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Callano v. Yamasaki,* 442 U.S. 682, 702 (1979). In *New York v. United States Dep't of Homeland Sec.,* 969 F.3d 42, 88 (2d Cir. 2020), *cert. granted sub nom.,* 141 S. Ct. 1370 (2021), *and cert. dismissed sub nom.,* 141 S. Ct. 1292 (2021), the Second Circuit stated: "We have no doubt that the law, as it stands today, permits district courts to enter nationwide injunctions, and [we] agree that such injunctions may be an appropriate remedy in certain circumstances – for example, where only a single case challenges the action or where multiple courts have spoken unanimously on the issue." The Second Circuit further explained that issuing "unqualified nationwide injunctions" is "less desirable" where, "as here, numerous challenges to the same agency action are being litigated simultaneously in district and circuit courts around the country." *Id.* In that circumstance, the Second Circuit "encourage[d] district courts to consider crafting preliminary injunctions that anticipate the possibility of conflict with our courts and provide for such a

contingency" by including, for example, "limiting language providing that the injunction would not supersede contrary rulings of other courts." *Id.*

21. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

Response: Please see my response to Question 20.

22. What is your understanding of the role of federalism in our constitutional system?

Response: Federalism is a cornerstone of our constitutional system. As the Supreme Court has stated, the sharing of power between federal and state governments:

> assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991). In addition, "a healthy balance of power between the States and the Federal Government . . . reduce[s] the risk of tyranny and abuse from either front." *Id.*

23. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

Response: Several different abstention doctrines exist. Each applies under different circumstances. Please see my response to Question 2.

24. What in your view are the relative advantages and disadvantages of awarding damages versus injunctive relief?

Response: Whether to award monetary damages or injunctive relief turns on the specific facts and the governing law of a particular matter. Depending on those case-specific factors, one form of relief might be more appropriate than the other. Injunctive relief is typically awarded only when "irreparable injury and inadequacy of legal remedies" have been shown. *Amoco Prod. Co. v. Vill. of Gambell, AK,* 480 U.S. 531, 542 (1987).

25. What is your understanding of the Supreme Court's precedents on substantive due process?

Response: The Supreme Court has held that the Fifth and Fourteenth Amendments protect unenumerated "fundamental rights and liberties which are, objectively,

deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed[.]" *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotations omitted). Examples of such rights and liberties include the right to marry, *see Loving v. Virginia,* 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); to direct the education and upbringing of children, *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); to marital privacy and contraception, *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California,* 342 U.S. 165 (1952), and to terminate a pregnancy under certain circumstances, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

26. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. What is your view of the scope of the First Amendment's right to free exercise of religion?

Response: The Supreme Court has recognized that the First Amendment right to free exercise "lies at the heart of our pluralistic society." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020). Actions by the federal government are governed by the Religious Freedom Restoration Act ("RFRA"), which states that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b); *see Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania,* 140 S. Ct. 2367 (2020) (applying RFRA to a religious organization); *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 719 (2014) (applying RFRA to small for-profit businesses owned by observant individuals); *see also* 42 U.S.C. § 2000cc(a)(1) (the Religious Land Use and Institutionalized Persons Act) ("RLUIPA") ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on . . . religious exercise . . . unless the government demonstrates" that it is "in furtherance of a compelling government interest; and is the least restrictive means of furthering" that interest.); *Mast v. Fillmore County*, 141 S. Ct. 2430, 2433 (Gorsuch, J., concurring) ("RLUIPA prohibits governments from infringing sincerely held religious beliefs and practices except as a last resort").

The framework for analyzing state government action under the Free Exercise Clause is set forth in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993). Under *Hialeah*, if a law is either not neutral or

is not generally applicable, then the law "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id*. at 531-32. In several more recent decisions, the Supreme Court has further developed that standard. *See, e.g.*, *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021) ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature"); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-97 (2021) ("Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied"); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) ("A law is not generally applicable if it invites government to consider particular reasons for a person's conduct by providing a mechanism for individualized exemptions" or "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way"); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018) ("[O]fficial expressions of hostility to religion in some of the [Colorado Civil Rights] commissioners' comments"—as opposed to "neutral and respectful consideration," *id.* at 1729—"were inconsistent with what the Free Exercise Clause requires.").

The Supreme Court has also identified a "ministerial exception" to claims under the Age Discrimination in Employment Act and Americans with Disabilities Act against a parochial school employer where the employee performed "vital religious duties." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020).

b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

Response: The right to free exercise is broader than freedom of worship. "The Free Exercise Clause embraces a freedom of conscience and worship." *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?

Response: In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691-92 (2014), the exercise of religion was substantially burdened where complying with the government's mandate would have forced the owners of closely-held, for-profit businesses to violate their sincerely held beliefs, while not complying would have subjected them to a "very heavy" fine.

d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

Response: Please see my response to Question 12.

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

Response: The Religious Freedom Restoration Act ("RFRA") "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a). Pursuant to Section 2000bb–3(b), "RFRA also permits Congress to exclude statutes from RFRA's protections." *Little Sisters of the Poor Saints Peter & Paul Home v. Pa.*, 140 S. Ct. 2367, 2383 (2020).

f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No. (I am not currently a judge, nor have I previously served as a judge.)

27. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."

a. What do you understand this statement to mean?

Response: I understand this statement to mean that judges should faithfully and impartially apply precedent and not base their decisions on personal values or preferences.

28. Have you ever taken the position in litigation or a publication that a federal or state statute was unconstitutional?

a. If yes, please provide appropriate citations.

Response: In my nearly twenty-six years of practice, I have worked on a broad range of matters. To the best of my recollection, the following cases are responsive to this question:

Home Depot U.S.A., Inc. v. Tim Russell, et al., CV-2008-001025 (Ala. Cir. Ct. Montgomery Cty.) (Shashy, J.), CV-2009-900344 (Ala.) (Malone, C.J., Murdock, Woodall, Bolin, Main, JJ.)

Home Depot U.S.A., Inc. v. Mich. Dep't of Treasury, No. 07-000118-MT (Mich. Ct. Cl.) (Aquilina, J.), *aff'd*, No. 301341 (Mich. Ct. App.) (Owens, P.J., Talbot, Meter, JJ.)

Home Depot, U.S.A. v. Conn. Dep't of Revenue Servs., Nos. HHB-CV-09-5014432-S & HHB-CV-09-5014433-S (Conn. Super. Ct.) (Cohn, J.)

29. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

Response: No.

30. Do you believe America is a systemically racist country?

Response: Whether America is systemically racist is a question within the province of legislators. If I am confirmed and a case alleging racial discrimination comes before me, I will faithfully and impartially apply Supreme Court and Second Circuit precedent.

31. Have you ever taken a position in litigation that conflicted with your personal views?

Response: Yes.

32. How did you handle the situation?

Response: I have represented a broad range of clients in a wide variety of matters. Regardless of a client's position, I have done my best to vigorously represent each client, in accordance with the law, as I have been duty bound to do. If confirmed, I will leave advocacy behind and will adhere to my oath to "faithfully and impartially discharge and perform my duties under the Constitution and laws of the United States," including by applying Supreme Court and Second Circuit precedent to all matters that come before me.

33. If confirmed, do you commit to applying the law written, regardless of your personal beliefs concerning the policies embodied in legislation?

Response: Yes.

34. Which of the Federalist Papers has most shaped your views of the law?

Response: No one Federalist Paper has particularly shaped my views of the law.

35. Do you believe that an unborn child is a human being?

Response: As a judicial nominee, I am constrained from opining on an issue such as this one that implicates legal, public policy, political, ethical, and religious questions. Code of Conduct for U.S. Judges (Jud. Conf. 2019). If I am confirmed and a case raising this issue comes before me, I will faithfully apply Supreme Court and Second Circuit precedent to the facts at hand.

36. Other than at your hearing before the Senate Judiciary Committee, have you ever testified under oath? Under what circumstances? If this testimony is available online or as a record, please include the reference below or as an attachment.

Response: I testified under oath in connection with the proceeding described in response to Question 4 of the Confidential Questionnaire for Judicial Nominees. I do not believe that the testimony is available online or as a record.

37. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:

a. *Roe v. Wade,* 410 U.S. 113 (1973)?

b. The Supreme Court's substantive due process precedents?

c. Systemic racism?

d. Critical race theory?

Response to all subparts: No.

38. Do you currently hold any shares in the following companies:

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response to all subparts: I do not hold shares in any of the aforementioned companies. I understand that some mutual funds I hold may contain them, but I do not own any individual shares.

39. Have you ever authored or edited a brief that was filed in court without your name on the brief?

a. If so, please identify those cases with appropriate citation.

Response: Throughout my nearly twenty-six years in practice, I have found it fairly routine for colleagues to review and comment on each other's draft briefs. On several occasions, I have provided feedback on draft briefs that were later filed in court without my name on them. The following is a matter currently being handled by my firm on which I have provided significant input: *Pacira CryoTech, Inc. v. Fortis Advisors LLC*, *solely in its capacity as representative of the Former Securityholders of MyoScience, Inc., Timothy Still, Gumballa Kris Kumar, Jessica Preciado, and the Former Securityholders of MyoScience, Inc.*, C.A. No. 2020-0694-PAF (Del. Ch. Ct.).

40. Have you ever confessed error to a court?

Response: Not that I recall.

a. If so, please describe the circumstances.

41. Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when testifying before the Senate Judiciary Committee. *See* U.S. Const. art. II, § 2, cl. 2.

Response: I understand that I am responsible for answering all questions fully and truthfully, and I have done so to the best of my ability and recollection.

Questions for the Record for Jennifer Rearden
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

   a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

   Response: No.

   b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?

   Response: No.

Senator Mike Lee Questions
for the Record
Jennifer Rearden, Nominee to the United States District Court for the Southern District of New York

1. **How would you describe your judicial philosophy?**

Response: If confirmed, I will uphold my oath to "faithfully and impartially discharge all the duties incumbent upon me . . . under the Constitution and laws of the United States." I will approach each case with an open mind, closely review the arguments, study the record in detail, apply Supreme Court and Second Circuit precedent, and stay within the confines of the questions presented to me.

2. **What sources would you consult when deciding a case that turned on the interpretation of a federal statute?**

Response: If confirmed, I will faithfully apply Supreme Court and Second Circuit precedent in construing any statute. If I were not bound by Supreme Court or Second Circuit precedent, I would examine the text of the relevant provision and apply its ordinary meaning. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) (observing that the Supreme Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."); *Lozano v. Alvarez,* 697 F.3d 41, 56 (2d Cir. 2012), *aff'd,* 572 U.S. 1 (2014) ("Where a term is undefined in a statute, 'we normally construe it [in] accord with its ordinary or natural meaning.'"(internal citation omitted)). In the event of an ambiguity in the text, I would consider canons of statutory construction, such as *expressio unius est exclusio alterius*, *see, e.g., Green v. City of N.Y.,* 465 F.3d 65, 78 (2d Cir. 2006), and persuasive authority. Only if those sources failed to resolve the ambiguity would I turn to legislative history. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 567 (2005) ("[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms"); *Green*, 465 F.3d at 78.

3. **What sources would you consult when deciding a case that turned on the interpretation of a constitutional provision?**

Response: If confirmed, I will follow Supreme Court and Second Circuit precedent concerning how to interpret any Constitutional provision, including by consulting the provision's original public meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (employing originalism in interpreting the Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (employing originalism in interpreting the Confrontation Clause of the Sixth Amendment).

4. **What role do the text and original meaning of a constitutional provision play**

when interpreting the Constitution?

Response: Please see my response to Question 3.

5. **How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?**

Response: Please see my response to Question 2.

a. **Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?**

Response: The "plain meaning" of a statute or Constitutional provision refers to the "ordinary public meaning of its terms at the time of its enactment." *See, e.g., Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1738 (2020) (observing that the Supreme Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (employing originalism in interpreting the Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (employing originalism in interpreting the Confrontation Clause of the Sixth Amendment). .

6. **What are the constitutional requirements for standing?**

Response: In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), the Supreme Court established the standard for Constitutional standing: (i) an "injury in fact" that is (ii) "fairly traceable" to the challenged conduct and (iii) "likely" to be "redressed by a favorable decision."

7. **Do you believe Congress has implied powers beyond those enumerated in the Constitution? If so, what are those implied powers?**

Response: In *McCulloch v. State of Maryland*, 17 U.S. 316 (1819), the Supreme Court recognized Congress's authority under Article I, Section 8 to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States." The Court stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421. In *McCulloch*, because Congress had the express power to "coin Money," it also had the implied power to set up a national bank.

8. **Where Congress enacts a law without reference to a specific Constitutional enumerated power, how would you evaluate the constitutionality of that law?**

Response: I would start by reviewing Supreme Court and Second Circuit precedent concerning any similar laws. The analysis turns on whether the law falls within one of Congress's enumerated powers. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012). The lack of a reference to a specific Constitutional enumerated power does not determine whether the law in question is Constitutional.

9. **Does the Constitution protect rights that are not expressly enumerated in the Constitution? Which rights?**

Response: The Supreme Court has held that the Fifth and Fourteenth Amendments protect unenumerated "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed[.]" *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotations omitted). Examples of such rights and liberties include the right to marry, *see Loving v. Virginia,* 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); to direct the education and upbringing of children, *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); to marital privacy and contraception, *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California,* 342 U.S. 165 (1952); and to terminate a pregnancy under certain circumstances, *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992).

10. **What rights are protected under substantive due process?**

Response: Please see my response to Question 9.

11. **If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v.New York*, on what basis do you distinguish these types of rights for constitutional purposes?**

Response: The Supreme Court itself has distinguished those types of rights. In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Supreme Court abrogated much of its decision in *Lochner*. In *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), the Court later explained that the "doctrine that prevailed in *Lochner* . . . ha[d] long since been discarded." In contrast, the Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), remain binding precedent.

12. **What are the limits on Congress's power under the Commerce Clause?**

Response: Under the Commerce Clause, Congress has the power to regulate "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce, or

persons or things in interstate commerce," and activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). Congress does not, however, have the power to "compel[] individuals to become active in commerce by purchasing a product." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012).

13. **What qualifies a particular group as a "suspect class," such that laws affecting that group must survive strict scrutiny?**

Response: A "suspect class" is one that has an "immutable characteristic determined solely by the accident of birth," or is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness[,] as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). The Supreme Court has identified race, national origin, religion, and alienage as suspect classifications requiring the application of strict scrutiny. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

14. **How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?**

Response: Checks and balances are the key protection afforded by our system of divided government. They are reflected in the structure of the Constitution itself, which expressly separates power among the legislative, executive, and judicial branches. As the Supreme Court has observed, the checks and balances inherent in a separation of powers system represent "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Morrison v. Olson,* 487 U.S. 654, 693 (1988) (quoting *Buckley v. Valeo,* 424 U.S. 1, 122 (1976) (noting that "[t]ime and again," the Supreme Court has "reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches.").

15. **How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?**

Response: I would review Supreme Court and Second Circuit precedent analyzing the relevant Constitutional provision to determine whether the branch had assumed an authority not granted to it by the text of the Constitution.

16. **What role should empathy play in a judge's consideration of a case?**

Response: Empathy should not play any role in a judge's consideration of a case. If confirmed, I will faithfully and impartially apply Supreme Court and Second Circuit precedent in every case before me.

17. **What's worse: Invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?**

Response: These outcomes are equally unacceptable, and judges should endeavor to avoid both.

18. **From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?**

Response: I have not had an opportunity to study the Supreme Court's approach with respect to this issue and therefore do not have a theory. In general, an aggressive exercise of judicial review could encroach on the legislature's territory, whereas judicial passivity could lead to the derogation of Constitutional safeguards.

19. **How would you explain the difference between judicial review and judicial supremacy?**

Response: As established in *Marbury v. Madison,* 5 U.S. 137 (1803), judicial review refers to the judiciary's power to evaluate the constitutionality of legislative and executive actions. I understand judicial supremacy to refer to the binding nature of federal judicial decisions on the other branches of the federal government and the states.

20. **Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affectingthe whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?**

Response: Under Article VI, all legislators—"both of the United States and of the several States"—take an oath to uphold the Constitution. Legislators also must abide by decisions of the Supreme Court. *See Cooper v. Aaron,* 358 U.S. 1, 18 (1958) (holding that the Supreme Court's decision in *Brown v. Board of Education* was binding on Arkansas's Governor and legislature). Accordingly, legislators should pass laws that uphold the Constitution and comport with the decisions of the Supreme Court.

21. **In Federalist 78, Hamilton says that the courts are the least dangerous branch**

because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.

Response: The notion that courts "have neither force nor will" is an important reminder that judges neither make nor enforce the law. Instead, judges are limited to interpreting the law.

22. **As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?**

Response: If confirmed, I will apply Supreme Court and Second Circuit precedent without regard to its "constitutional underpinnings." In the absence of precedent on point, I would review analogous Supreme Court and Second Circuit precedent, as well as persuasive authority. In addition, I would employ the methods of interpretation described in response to Question 3.

23. **When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?**

Response: None.

24. **The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?**

Response: I am not familiar with this statement, and I do not have a personal definition of "equity." I understand it to refer to "fairness; impartiality; evenhanded dealing," as defined in Black's Law Dictionary.

25. **Is there a difference between "equity" and "equality?" If so, what is it?**

Response: Black's Law Dictionary defines "equity" as "fairness; impartiality;

evenhanded dealing" and "[t]he body of principles constituting what is fair and right." Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines "equality" as "[t]he quality, state, or condition of being equal." *Id.*

26. **Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 24)?**

Response: Under the Fourteenth Amendment, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. The Fourteenth Amendment does not refer to "equity." If confirmed, I will faithfully apply Supreme Court and Second Circuit precedent to any matters before me concerning the Fourteenth Amendment.

27. **How do you define "systemic racism?"**

Response: I do not have a personal definition of "systemic racism." If confirmed, I will faithfully apply Supreme Court and Second Circuit precedent to any questions concerning racial discrimination that are raised before me.

28. **How do you define "critical race theory?"**

Response: I do not have a personal definition of "critical race theory." Britannica defines "critical race theory" as an "intellectual and social movement and loosely organized framework of legal analysis based on the premise that race is not a natural, biologically grounded feature . . . but a socially constructed (culturally invented) category that is used to oppress and exploit people of color."

29. **Do you distinguish "critical race theory" from "systemic racism," and if so, how?**

Response: Without a personal definition of these terms, I am unable to distinguish them. Please see my responses to Questions 27 and 28.

Senator Ben Sasse
Questions for the Record for Jennifer H. Rearden
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
March 2, 2022

1. Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?

Response: No.

2. Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?

Response: No.

3. How would you describe your judicial philosophy?

Response: If confirmed, I will uphold my oath to "faithfully and impartially discharge all the duties incumbent upon me . . . under the Constitution and laws of the United States." I will approach each case with an open mind, closely review the arguments, study the record in detail, apply Supreme Court and Second Circuit precedent, and stay within the confines of the questions presented to me.

4. Would you describe yourself as an originalist?

Response: If confirmed, I will faithfully apply Supreme Court and Second Circuit precedent concerning how to interpret any Constitutional provision or statute—including by consulting the provision's original public meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (employing originalism in interpreting the Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (employing originalism in interpreting the Confrontation Clause of the Sixth Amendment). I would not apply any particular label to my judicial philosophy.

5. Would you describe yourself as a textualist?

Response: If confirmed, I will faithfully apply Supreme Court and Second Circuit precedent in construing any statute. If I were not bound by Supreme Court or Second Circuit precedent, I would examine the text of the relevant provision and apply its ordinary meaning. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) (observing that the Supreme Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."); *Lozano v. Alvarez,* 697 F.3d 41, 56 (2d Cir. 2012), *aff'd,* 572 U.S. 1 (2014) ("Where a term is undefined in a

statute, 'we normally construe it [in] accord with its ordinary or natural meaning.'"(internal citation omitted)). Only in the event of an ambiguity in the text would I consider canons of statutory construction, such as *expressio unius est exclusio alterius*, *see, e.g., Green v. City of N.Y.,* 465 F.3d 65, 78 (2d Cir. 2006), and persuasive authority. I would not apply any particular label to my judicial philosophy.

6. Do you believe the Constitution is a "living" document whose precise meaning can change over time? Why or why not?

Response: I understand "living constitutionalism" to refer to interpreting the Constitution based on the belief that the Constitution evolves and changes over time, absent formal amendment. I do not view myself as a "living constitutionalist."

7. Please name the Supreme Court Justice or Justices appointed since January 20, 1953 whose jurisprudence you admire the most and explain why.

Response: If confirmed, I will faithfully apply Supreme Court precedent. Of non-current Justices appointed since January 20, 1953, one I admire is Justice Ginsburg. During her time in the classroom and as an advocate, Justice Ginsburg was a force for women's equality.

8. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for appellate court to reaffirm its own precedent that conflicts with the original public meaning of the Constitution?

Response: A Circuit Court will follow its own precedent "unless a Supreme Court decision or an en banc holding of" the Circuit "implicitly or explicitly overrules the prior decision." *See Anderson v. Recore*, 317 F.3d 194, 201 (2d Cir. 2003). Under Federal Rule of Appellate Procedure 35(a), when determining whether an appeal or other proceeding should be reviewed by a Circuit Court en banc, a majority of the Circuit judges consider whether "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(1)-(2).

9. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for an appellate court to reaffirm its own precedent that conflicts with the original public meaning of the text of a statute?

Response: Please see my response to Question 8.

10. What role should extrinsic factors not included within the text of a statute, especially legislative history and general principles of justice, play in statutory interpretation?

Response: If confirmed, I will faithfully apply Supreme Court and Second Circuit precedent in construing any statute. If I were not bound by Supreme Court or Second

Circuit precedent, I would examine the text of the relevant provision and apply its ordinary meaning. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) (observing that the Supreme Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."); *Lozano v. Alvarez,* 697 F.3d 41, 56 (2d Cir. 2012), *aff'd,* 572 U.S. 1 (2014) ("Where a term is undefined in a statute, 'we normally construe it [in] accord with its ordinary or natural meaning.'"(internal citation omitted)). In the event of an ambiguity in the text, I would consider canons of statutory construction, such as *expressio unius est exclusio alterius*, *see, e.g., Green v. City of N.Y.,* 465 F.3d 65, 78 (2d Cir. 2006), and persuasive authority. As guided by the Supreme Court and the Second Circuit, I could turn to legislative history only if those sources failed to resolve the ambiguity. *Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 567 (2005) (stating that extrinsic materials "have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."). The "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'" *Garcia v. United States,* 469 U.S. 70, 76 (1984) (internal citation omitted). Importantly, "floor statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB v. SW Gen., Inc.,* 137 S. Ct. 929, 943 (2017). General principles of justice should not play a role in statutory interpretation.

11. If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant? If so, how so?

Response: Discrimination in sentencing based on a defendant's racial or ethnic group identity is not appropriate. Section 5H1.10 of the United States Sentencing Commission Guidelines Manual states that race, sex, national origin, creed, religion, and socio-economic status are "not relevant in the determination of a sentence." The factors a court must consider in sentencing are enumerated in 18 U.S.C. § 3553(a).

Questions from Senator Thom Tillis
for Jennifer Rearden
Nominee to be United States District Judge for the Southern District of New York

1. **Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

   Response: Yes.

2. **What is judicial activism? Do you consider judicial activism appropriate?**

   Response: The term "judicial activism" is subject to different meanings. If the question refers to a judge resolving a case based on the judge's personal preferences, as opposed to faithfully applying Supreme Court and Circuit Court precedent, then I consider "judicial activism" to be inappropriate.

3. **Do you believe impartiality is an aspiration or an expectation for a judge?**

   Response: Impartiality is an expectation.

4. **Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

   Response: No.

5. **Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

   Response: Yes, there may be occasions where faithfully interpreting the law may lead to an outcome that is at odds with a judge's personal perspectives. The duty of a judge, however, is to set aside his or her personal perspectives and faithfully interpret the law regardless of the outcome.

6. **Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?**

   Response: No.

7. **What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?**

   Response: If confirmed, I will faithfully apply the Supreme Court's precedent in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and the Second Circuit's precedent in *Kachalsky v. Cnty. of Westchester,* 701 F.3d 81 (2d Cir. 2012).

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit someone's constitutional rights? In other words, does a pandemic limit someone's constitutional rights?

Response: If I am confirmed and these questions come before me, I will faithfully apply Supreme Court and Second Circuit precedent, as well as any other relevant constitutional and statutory provisions.

9. What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?

Response: When a qualified immunity defense is asserted, the court must consider whether the government official violated a statutory or constitutional right that was clearly established at the time of the incident. *Jones v. Treubig,* 963 F.3d 214, 224 (2d Cir. 2020). In the Second Circuit, the official is entitled to qualified immunity "[i]f a plaintiff fails at either step." *Vega v. Semple,* 963 F.3d 259, 273 (2d Cir. 2020). The Supreme Court has held that "[a] right is clearly established when it is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Rivas-Villegas v. Cortesluna,* 142 S. Ct. 4, 7 (2021) (per curiam) (internal citation omitted).

10. Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?

Response: If confirmed, I will faithfully apply the qualified immunity standard detailed in Supreme Court and Second Circuit precedent, as described in response to Question 9.

11. What do you believe should be the proper scope of qualified immunity protections for law enforcement?

Response: Please see my responses to Questions 9 and 10.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: In my nearly twenty-six years of practice, I do not recall working on a matter involving patent law. If I am confirmed and a patent case comes before me, I will research and faithfully apply Supreme Court precedent. Such precedent likely would include *Alice Corp. v. CLS Bank Int'l*, U.S. 208 (2014), which has had a significant impact on software inventors and inventions.

13. How would you apply current patent eligibility jurisprudence to the following hypotheticals. Please avoid giving non-answers and actually analyze these hypotheticals.

a. *ABC Pharmaceutical Company* develops a method of optimizing dosages of a substance that has beneficial effects on preventing, treating or curing a disease or condition for individual patients, using conventional technology but a newly-discovered correlation between administered medicinal agents and bodily chemicals or metabolites. Should this invention be patent eligible?

b. *FinServCo* develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology. Should *FinServCo's* business method standing alone be eligible? What about the business method as practically applied on a computer?

c. *HumanGenetics* Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if *HumanGenetics* Company wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?

d. *BetterThanTesla ElectricCo* develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should *BetterThanTesla's* billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?

e. *Natural Laws and Substances, Inc.* specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?

f. A business methods company, *FinancialServices Troll,* specializes in taking conventional legal transaction methods or systems and implementing them through a computer process or artificial intelligence. Should such implementations be patent eligible? What if the implemented method actually improves the expected result by, for example, making the methods faster, but doesn't improve the functioning of the computer itself? If the computer or artificial intelligence implemented system does actually improve the expected result, what if it doesn't have any other meaningful limitations?

g. *BioTechCo* discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTech Co* invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?

h. Assuming *BioTechCo's* diagnostic test is patent eligible, should there exist provisions in law that prohibit an assertion of infringement against patients receiving the diagnostic test? In other words, should there be a testing exemption for the patient health and benefit? If there is such an exemption, what are its limits?

i. *Hantson Pharmaceuticals* develops a new chemical entity as a composition of matter that proves effective in treating TrulyTerribleDisease. Should this new chemical entity be patent eligible?

j. *Stoll Laboratories* discovers that superconducting materials superconduct at much higher temperatures when in microgravity. The materials are standard superconducting materials that superconduct at lower temperatures at surface gravity. Should *Stoll Labs* be able to patent the natural law that superconductive materials in space have higher superconductive temperatures? What about the space applications of superconductivity that benefit from this effect?

Response to all subparts: If I am confirmed, and facts similar to those in the hypotheticals above are present in matters before me, I will faithfully apply relevant precedent. As a judicial nominee, I am constrained from detailing how I would address any of the issues arising from these hypotheticals. Code of Conduct for U.S. Judges (Jud. Conf. 2019).

14. Based on the previous hypotheticals, do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: Please see my response to Question 12.

15. Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

Response: In my nearly twenty-six years of practice, I do not recall working on a matter involving copyright law. If I am confirmed and a copyright case comes before me, I will research and faithfully apply Supreme Court and Second Circuit precedent.

b. Please describe any particular experiences you have had involving the Digital Millennium Copyright Act.

Response: None.

c. What experience do you have addressing intermediary liability for online service providers that host unlawful content posted by users?

Response: None.

d. What experience do you have with First Amendment and free speech issues? Do you have experience addressing free speech and intellectual property issues, including copyright?

Response: I have litigated First Amendment issues in connection with my practice, including in *N.Y. Skyline, Inc. v. City of New York,* No. 106840/2011 (N.Y. Cty. Sup. Ct.) (Mills, J.), *rev'd,* No. 2012-01379 (N.Y. App. Div. 1st Dep't 2012) (Andrias, Saxe, Acosta, Freedman, Richter, JJ.).

In my nearly twenty-six years of practice, I do not recall working on a matter involving intellectual property issues. If I am confirmed and an intellectual property case comes before me, I will research and faithfully apply Supreme Court and Second Circuit precedent.

16. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office recently reported courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

a. In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?

Response: If I am confirmed, I will faithfully apply Supreme Court and Second Circuit precedent. If I were not bound by Supreme Court or Second Circuit precedent, I would examine the text of the relevant provision and apply its ordinary meaning. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) (observing that the Supreme Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."); *Lozano v. Alvarez,* 697 F.3d 41, 56 (2d Cir. 2012), *aff'd,* 572 U.S. 1 (2014) ("Where a term is undefined in a statute, 'we normally construe it [in] accord with its ordinary or natural meaning.'"(internal citation omitted)). Only in the event of an ambiguity in the text would I consider canons of statutory construction, such as *expressio unius est exclusio alterius*, *see, e.g., Green v. City of N.Y.,* 465 F.3d 65, 78 (2d Cir. 2006), and persuasive authority. As guided by the Supreme Court and the Second Circuit, I could turn to legislative history only if those sources failed to resolve the ambiguity. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 567 (2005) ("[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms"); *Green*, 465 F.3d at 78.

b. Likewise, what role does or should the advice and analysis of the expert federal agency with jurisdiction over an issue (in this case, the U.S. Copyright Office) have when deciding how to apply the law to the facts in a particular case?

Response: The extent of judicial deference to an agency's interpretation of a statute depends on the format in which it is presented. In *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000), the Supreme Court held that agency interpretations embodied in opinion letters, "policy statements, agency manuals, and enforcement guidelines . . . do not warrant *Chevron*-style deference" by a court. "Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' . . . to the extent that those interpretations have the 'power to persuade.'" *Id.* (internal citation omitted).

c. Do you believe that awareness of facts and circumstances from which copyright infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

Response: As a judicial nominee, I am constrained from providing opinions regarding a matter that could potentially come before me. Code of Conduct for U.S. Judges (Jud. Conf. 2019). If such facts and circumstances were presented in a matter before me, I would faithfully apply Supreme Court and Second Circuit precedent.

17. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.

a. How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?

Response: If confirmed, I will faithfully apply the Digital Millennium Copyright Act as drafted and binding Supreme Court and Second Circuit precedent.

b. How can judges best interpret and apply prior judicial opinions that relied upon the then-current state of technology once that technological landscape has changed?

Response: Please see my response to Question 17a.

18. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.

a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

Response: I have not seen this and do not have an opinion. The Southern District of New York does not have a single-judge division.

b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

Response: If confirmed, I will faithfully apply all relevant authorities regarding venue and adhere to the rules concerning the assignment of matters.

c. Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?

Response: Please see my response to Question 18b.

d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

Response: Please see my response to Question 18b.

19. In just three years, the Court of Appeals for the Federal Circuit has granted no fewer than 19 mandamus petitions ordering a particular sitting district court judge to transfer cases to a different judicial district. The need for the Federal Circuit to

intervene using this extraordinary remedy so many times in such a short period of time gives me grave concerns.

a. What should be done if a judge continues to flaunt binding case law despite numerous mandamus orders?

Response: As a judicial nominee, I am constrained from providing an opinion regarding the manner in which the Federal Circuit should approach this hypothetical. Code of Conduct for U.S. Judges (Jud. Conf. 2019). If confirmed, I will faithfully apply all binding Supreme Court and Second Circuit precedent and adhere to the rules regarding the assignment of matters.

b. Do you believe that some corrective measure beyond intervention by an appellate court is appropriate in such a circumstance?

Response: Please see my response to Question 19a.

20. When a particular type of litigation is overwhelmingly concentrated in just one or two of the nation's 94 judicial districts, does this undermine the perception of fairness and of the judiciary's evenhanded administration of justice?

Response: This question is within the province of legislators. Please also see my response to Question 18b.

a. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

Response: Please see my response to Question 20.

b. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: Please see my response to Question 20.

21. Mandamus is an extraordinary remedy that the court of appeals invokes against a district court only when the petitioner has a clear and indisputable right to relief and the district judge has clearly abused his or her discretion. Nearly every issuance of mandamus may be viewed as a rebuke to the district judge, and repeated issuances of mandamus relief against the same judge on the same issue suggest that the judge is ignoring the law and flouting the court's orders.

a. If a single judge is repeatedly reversed on mandamus by a court of appeals on the same issue within a few years' time, how many such reversals do you believe

must occur before an inference arises that the judge is behaving in a lawless manner?

Response: As a judicial nominee, I do not believe it would be appropriate for me to weigh in on this matter.

b. Would five mandamus reversals be sufficient? Ten? Twenty?

Response: Please see my response to Question 21a.

Nomination of Jennifer Rearden to the
United States District Court for the
Southern District of New York
Questions for the Record
Submitted March 9, 2022

QUESTIONS FROM SENATOR WHITEHOUSE

1. **After years of litigation in Ecuador, environmental lawyer Steven Donziger won a $9.5 billion judgment against Chevron on behalf of Amazonians whose health and land were damaged by oil-drilling waste. Although appellate courts in Ecuador upheld the judgment, in 2011, your law firm, Gibson Dunn & Crutcher, initiated proceedings in the Southern District of New York on behalf of Chevron to have the judgment set aside on the basis of fraud under a civil RICO theory. Environmentalists and human-rights activists have condemned your firm's aggressive strategy in this case as an attempt to harass and intimidate Donziger and other individuals involved in bringing the initial suit.[1]**

    a. **I understand you had some involvement in this case. Please describe the nature and extent of your involvement in this case or any related matter.**

    Response: Years after Gibson Dunn began working on Chevron matters relating to the Ecuador judgment, I was asked to provide support to partners on the team at a time when they were heavily committed. To the best of my recollection, I reviewed research and analysis, helped supervise associates, drafted and revised work product, and worked on third-party subpoenas. I did not enter an appearance in court, and I never went to court in connection with any aspect of the matter. I have never met Steven Donziger. I do not recall ever meeting or speaking with anyone from Chevron.

    b. **When did you begin working on this case or any related matter?**

    Response: December 2012.

    c. **Are you still actively engaged in representing Chevron in this case or any related matter? If not, when did your involvement end?**

    Response: No. Except for 30 minutes in 2014, my involvement ended in 2013.

    d. **I understand you were involved in the preparation of non-party or third-party subpoenas related to this matter. I also understand that Gibson Dunn was sanctioned in 2011 for serving a third party with an overly burdensome**

[1] *See, e.g.*, Jonathan Watts, *Nobel laureates condemn 'judicial harassment' of environmental lawyer*, The Guardian (Apr. 18, 2020), https://www.theguardian.com/world/2020/apr/18/nobel-laureates-condemn-judicial-harassment-ofenvironmental-lawyer.

subpoena[2] and almost sanctioned again in 2013 for its "egregiously overbroad" subpoena to a different third party.[3]

i. **Were you involved in preparing, drafting, reviewing, or otherwise advising on the subpoena that was the subject of sanctions in *Chevron Corp. v. Salazar*, No. 11-0691-LAK, 2011 WL 7112979 (D. Or. Nov. 30, 2011)? If so, please specify the nature and extent of your involvement.**

Response: No.

ii. **Were you involved in preparing, drafting, reviewing, or otherwise advising on the subpoena that was the subject of the court's criticism in *Chevron Corp. v. Donziger*, No. 13-MC-80038 CRB (NC), 2013 WL 1402727 (N.D. Cal. Apr. 5, 2013)? If so, please specify the nature and extent of your involvement.**

Response: No.

iii. **Were you involved in preparing, drafting, reviewing, or otherwise advising on any other subpoena that was the subject of sanctions or quashed in whole or part in this case or any other matter, whether related or unrelated to the *Chevron* case? If so, please specify the nature and extent of your involvement.**

Response: To the best of my recollection, I have not been involved with any other subpoena—either related or unrelated to the *Chevron* matter—that was the subject of sanctions or quashed in whole or in part.

2. **In 2019, Donziger was charged with criminal contempt for refusing to comply with a court order in the civil RICO suit directing him to turn over his electronic devices to Chevron. When the U.S. Attorney's office refused to prosecute, the presiding judge appointed a private special prosecutor to bring the case, and Donziger was ultimately found guilty. Pre- and post-trial, Donziger has been under house arrest for more than two years. He also served 45 days in prison. Although the private special prosecutor was from a different law firm, The Nation recently reported that, on multiple occasions, Gibson Dunn attorneys consulted with the special prosecutor during the criminal contempt matter.[4]**

---

[2] *Chevron Corp. v. Salazar*, No. 11-0691-LAK, 2011 WL 7112979, at *4 (D. Or. Nov. 30, 2011).
[3] *Chevron Corp. v. Donziger*, No. 13-MC-80038 CRB (NC), 2013 WL 1402727, at *6 (N.D. Cal. Apr. 5, 2013).
[4] James North, *Chevron's Prosecution of Steven Donziger*, The Nation (Jan. 27, 2022), https://www.thenation.com/article/society/donziger-chevron-documents/. [5] *See* https://www.lawline.com/lawyer/jennifer-h-rearden.

a. **Did you ever communicate or appear on any correspondence with the special prosecutor or her team? If so, please describe the nature of that communication or correspondence.**

Response: No. I had no involvement in that matter.

b. **Did you do any work in support of other attorneys' communication or consultation with the special prosecutor or her team? If so, please specify the nature and extent of your involvement.**

Response: No. I had no involvement in that matter.

3. **Page 1343 of your Senate Judiciary Questionnaire attachments includes your firm biography. It states you are "part of the Gibson Dunn team that represented Chevron Corporation in its successful effort to block enforcement of a 2003 judgment for $9.2 billion in an environmental case in Ecuador." The Chevron case is one of only two matters listed in that biography. An online biography from a continuing education course you taught in 2019 also lists that case as a significant matter in which you have been involved.[5] Why did you choose to include the Chevron case as a representative matter in those biographies?**

Response: I do not recall. Page 1343 of my Senate Judiciary Questionnaire is from materials for a continuing legal education seminar. Over the course of my career, I have sometimes been asked by CLE providers and others to highlight particular matters in my biography.

4. **Are you familiar with strategic lawsuits against public participation (SLAPP) suits?**

Response: Yes.

a. Please describe your understanding of what a SLAPP suit is.

Response: A SLAPP suit is a strategic lawsuit against public participation.

b. Do you believe SLAPP suits—which, at their core, seek to intimidate individuals who stand up to big corporations—are good or bad for the justice system?

Response: The procedural and legal standards that apply when cases are challenged as SLAPP suits are the subject of litigation. As a judicial nominee, I am constrained from providing opinions regarding matters that could come before me if I am confirmed. Code of Conduct for U.S. Judges (Jud. Conf. 2019).

c. Some observers have described Gibson Dunn's litigation strategy on behalf of Chevron in the civil RICO case against Steven Donziger as a SLAPP suit because it aggressively targeted an individual seeking to hold a big oil

company accountable for damaging the environment.[5] If you are confirmed, how can litigants wishing to hold corporations accountable for misconduct be confident that you will treat them fairly?

Response: Over the course of my career, I have represented a broad range of clients in a wide variety of matters. Most of my matters on behalf of businesses have been opposite other businesses or the government—not individuals. I have also represented individuals and non-profit organizations, including in several pro bono cases. For example, I first-chaired a jury trial in the Southern District of New York on behalf of a domestic caregiver, Patricia Francois, who had sued her former employers. The jury found for Ms. Francois on her claims for assault and for unpaid wages under the Fair Labor Standards Act and the New York Labor Law. The U.S. Court of Appeals for the Second Circuit affirmed the district court's judgment. A letter from Douglas Lasdon, Executive Director of the Urban Justice Center, to Chair Durbin and Ranking Member Grassley, dated February 25, 2022, further details my work on Ms. Francois's case.

I also represented an LGBTQ client before a New York court and administrative tribunals in connection with his spousal-death-benefit claim after his Vermont civil-union spouse suddenly died. In addition, I secured a settlement on behalf of a New York City-based non-profit organization that serves underrepresented New York City youth. And I helped a financial empowerment and affordable lending housing organization successfully oppose construction liens that had wrongly been imposed on its property and were causing hardship.

Environmental lawyers and climate change experts who have written to Chair Durbin and Ranking Member Grassley in support of my nomination have attested to my balanced approach. *See, e.g.*, Letter from Michael B. Gerrard, Andrew Sabin Professor of Professional Practice and Director of the Sabin Center for Climate Change Law at Columbia Law School, dated February 20, 2022 (discussing our work together on a "litigation [that] raised environmental issues, principally involving the traffic that would be generated by the stadium and the associated air pollution and noise," describing me as "very sensitive to these environmental issues and to the concerns of the community members who feared the stadium would degrade their neighborhood in a variety of ways," and further commenting on my "calm, steady demeanor that one hopes for in a judge."); Letter from Jeffrey Gracer, Of Counsel at Sive Paget Riesel, former Chair of the Environmental Law Committee of the New York City Bar Association, founder of the Environmental Program at the Vance Center for International Justice at the City Bar (which provides pro bono assistance to environmental organizations around the world), and founder, President, and Chair of the New York City Climate Action Alliance, dated February 22, 2022 (commenting that I "always treat[] people with respect and dignity," am "committed to the administration of

[5] *See* Watts, *Nobel laureates condemn 'judicial harassment' of environmental lawyer*, *supra* note 1.

justice," have "the personal qualities to do so fairly, with compassion and respect for all," and, in our work together, "made a point of seeking out different points of view before . . . reach[ing] a conclusion.").

If confirmed, I will steadfastly adhere to my oath to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States."